STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Judges: Hilda R. Gage, Mark J. Cavanagh, and Kurtis T. Wilder

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PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

DANIEL JESSE GONZALEZ,
Defendant-Appellant.

Supreme Court
No. 120363

Court of Appeals
No. 220715

Saginaw Circuit Court
No. 98-015361-FC

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE STATE OF MICHIGAN

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Amicus Curiae accepts Plaintiff-Appellee's Statement of Basis of Jurisdiction.

Counter-Statement of Questions Presented

I. A defendant's intent or state of mind, like all the elements of a crime, may be shown by circumstantial evidence. In this case, defendant Gonzalez strangled the victim, and repeatedly hit her in the head with a ball bat, while she was alive. Evidence of manual strangulation can be used to infer that the defendant had time to take a "second look." Based on these considerations, did the prosecutor prove the elements of first-degree, premeditated murder?

Trial Court Would Answer:	"Yes."
Court of Appeals Answers:	"Yes."
Defendant-Appellant Answers:	"No."
Plaintiff-Appellee Answers:	"Yes."
Amicus Curiae Answers:	"Yes."

II. Whether a jury instruction applies to a case's facts lies within the trial court's sound discretion. Someone who knowingly and willingly unites in committing a crime is an accomplice. Defendant Gonzalez denied committing the crime. Witness Couch and his mother testified that Couch was home asleep when the crime occurred. Where, as here, the facts failed to support it, did the trial court commit no error by foregoing a *sua sponte* jury instruction on accomplice testimony?

Trial Court Would Answer:	"Yes."
Court of Appeals Answers:	"Yes."
Defendant-Appellant Answers:	"No."
Plaintiff-Appellee Answers:	"Yes."
Amicus Curiae Answers:	"Yes."

III. Defendant claims that he was denied the effective assistance of counsel when his trial attorney failed to request a jury instruction on the unreliability of accomplice testimony. Where, as here, the trial court properly instructed the jury, is the defendant's attorney required to advocate a position that lacks merit?

Trial Court Would Answer:	"No."
Court of Appeals Answers:	"No."
Defendant-Appellant Answers:	"Yes."
Plaintiff-Appellee Answers:	"No."
Amicus Curiae Answers:	"No."

Counter-Statement Of Facts

Amicus Curiae accepts the facts contained in Plaintiff-Appellee's Brief On Appeal.

I

A defendant's intent or state of mind, like all the elements of a crime, may be shown by circumstantial evidence. In this case, defendant Gonzalez strangled the victim, and repeatedly hit her in the head with a ball bat, while she was alive. Evidence of manual strangulation can be used to infer that the defendant had time to take a "second look." Based on these considerations, the prosecutor proved the elements of first-degree, premeditated murder.

Issue Preservation: Defendant claims that the evidence was insufficient to sustain his conviction of first-degree murder. He did not need to take any special steps to preserve this issue for appeal. People v Hawkins, 245 Mich App 439, 457; 628 NW2d 105 (2001). By his argument, defendant invokes his constitutional rights to due process of law. Id., citing People v Wolfe, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); see also US Const, Am XIV; Const 1963, art 1, § 17. Thus, review is *de novo* for this constitutional right. Hawkins, supra, at 457, citing People v Houstina, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Standard of Review: The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. People v Nowack, 462 Mich 392, 399; 614 NW2d 78 (2000), citing People v Hampton, 407 Mich 354; 285 NW2d 284 (1979); Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. Nowack, supra, at 400. The scope of review is the same whether the evidence is direct or

circumstantial. Id. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. Id., citing People v Carines, 460 Mich 750, 757; 597 NW2d 130 (1999).

The Nowack Court, citing People v Konrad, 449 Mich 263, 273 n6; 536 NW2d 517 (1995), cautioned reviewing courts that the prosecutor need not negate every reasonable theory consistent with innocence to discharge its responsibility. It need only convince the jury in the face of whatever contradictory evidence the defendant may provide. Nowack, supra, at 400. Nor will this Court interfere with the jury's role of determining intent, the weight of evidence, or the credibility of witnesses. People v Wolfe, supra, at 514; People v Avant, 235 Mich App 499, 506; 597 NW2d 864 (1999); People v Terry, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Legal Analysis: In determining whether there was sufficient evidence, this Court must reject defendant's "innocent explanations" (since they were rejected by the jury); his convictions must be sustained if "finding [the evidence] where we may, and putting what was most favorable to the prosecution together, and discarding all other [evidence], [this Court can] say it fairly tended to establish the charge made." Wolfe, at 515, quoting People v Howard, 50 Mich 239, 242; 15 NW 101 (1883).

First-degree, premeditated murder is "murder which is perpetrated by means of poison, or lying in wait, or other willful, deliberate, and premeditated killing." MCL 750.316.[1] An "intentional" crime is one that is not accidental. People v Kelley, 433

[1] MCL 750.316, in pertinent part, reads: (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.
(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal

Mich 882, 887 n11; 446 NW2d 821 (1989). Motive is always relevant in a murder prosecution. People v Kuhn, 232 Mich 310, 312; 205 NW 188 (1925); People v Mihalko, 306 Mich 356, 361; 10 NW2d 914 (1943).[2]

The word "premeditation" means: "the act of meditating in advance; deliberation upon a contemplated act; plotting or contriving; a design formed to do something before it is done. Decision or plan to commit a crime, such as murder, before committing it. A prior determination to do an act, but such determination need not exist for any particular period before it is carried into effect. ***Term 'premeditation,' means 'thought of beforehand for any length of time, however short.'*** State v. Marston, Mo., 479 S.W.2d 481, 484."[3] (Emphasis added.)

In this case, defendant Gonzalez strangled the victim, and repeatedly hit her in the head with a ball bat, while she was alive. A defendant's intent or state of mind, like all the elements of a crime, may be shown by circumstantial evidence. People v Dumas, 454 Mich 390, 398; 563 NW2d 31 (1997). Defendant caused the victim's death by choking her and inflicting blunt-force, head trauma. It's common knowledge that if you hit

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sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping.

[2] In People v Kuhn, supra, at 312, the Court wrote: "Although sometimes confused, motive and intent are not synonymous terms. A motive is an inducement for doing some act; it gives birth to a purpose. The resolve to commit an act constitutes the intent. The motive inducing the resolve, while illuminative of the intent, is necessarily merged therein and is not an essential element in proving commission of crime. The essential element of intent is not at all dependent upon motive. If the intent appears the motive inducing the design may be shown but if not shown the design remains and, as the intent governs, the inducement creating the intent is not essential. A motive is a relevant but not an essential fact in proof of murder. It is true it exists whether disclosed or not. If disclosed it may aid the prosecution, but if not disclosed, or only faintly discernible, its absence or hidden character does not abort the charge if the intent is established."

[3] Black's Law Dictionary, Fifth Edition, (1981), p. 1062.

someone repeatedly in the head with a ball bat or choke them around the neck, death will result. The nature of the weapon used (a ball bat), and the fact it was used on the victim's head demonstrate defendant's intent to kill. Further, evidence of manual strangulation can be used to infer that the defendant had time to take a "second look." People v Johnson, 460 Mich 720, 733; 597 NW2d 73 (1999).

Based on these considerations, the prosecutor proved the elements of first-degree, premeditated murder beyond a reasonable doubt.

II

Whether a jury instruction applies to a case's facts lies within the trial court's sound discretion. Someone who knowingly and willingly unites in committing a crime is an accomplice. Defendant Gonzalez denied committing the crime. Witness Couch and his mother testified that Couch was home asleep when the crime occurred. Where, as here, the facts failed to support it, the trial court committed no error by foregoing a *sua sponte* jury instruction on accomplice testimony.

Standard of Review and Issue Preservation: The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. People v Heikkinen, 250 Mich App 322, 327; 646 NW2d 190 (2002). Defendant claims that the trial court's failure to *sua sponte* provide a cautionary instruction regarding accomplice testimony requires reversal. Where there is no request for a jury instruction, the issue is reviewed for plain error that affected defendant's substantial rights. People v Taylor, 252 Mich App 519, 523; 652 NW2d 526 (2002). Reversal is warranted only if the unpreserved error resulted in the conviction of an actually innocent

defendant or when the error seriously affected the fairness, integrity or reputation of the judicial proceedings. Id.

Someone who willingly unites in committing a crime is an accomplice.

Before examining Michigan case precedent and jury instructions concerning accomplice testimony, it is instructive to look at case law from other jurisdictions. Kentucky jurisprudence provides one of the best definitions of who is an accomplice. An accomplice is one who knowingly, voluntarily, and with common intent, unites with the principal in the commission of the crime, either by being present and joining in the criminal act as an aider and abettor, or, if absent, by advising and encouraging in its commission. Chaney v Commonwealth, 307 SW2d 770, 772 (1957).

In New Jersey, the general rule for determining whether a witness is an accomplice is if he could be charged with and convicted of the specific offense for which an accused is on trial. State v Mangrella, 86 NJ Super 404, 407; 207 A2d 175 (1965). The Mangrella case involved a defendant convicted of selling heroin, and the alleged buyer testified against defendant. In Mangrella, defendant argued that the trial court's failure to charge the "accomplice rule" was plain error. Id. Trial counsel did not ask for such a charge. Id. In Mangrella, the Court found that to speak of the "accomplice rule" with reference to the testimony of the buyer is illogical and leads to confusion, for the buyer was not the defendant's "accomplice" unless the defendant was indeed guilty of selling him the narcotics. Id. The Mangrella Court, at 407, cited Chief Justice Weintraub's concurrence in State v Begyn, 34 NJ 35, 58 (1961):

> "* * * **[S]ince the witnesses could not be guilty unless defendant too was guilty of the offense for which he was on trial, an instruction characterizing the witnesses as guilty of crime had to carry the implication that by the same token defendant too was guilty. To state**

> **it in other terms, defendant's requests to charge involved a paradox, to wit, that the jury was asked to view cautiously the testimony of the witnesses upon a premise which simultaneously imported defendant's guilt, and this because the witnesses could not be guilty unless defendant too was guilty. It would be quite a feat for a jury both (1) to discredit the witnesses because they believed their incriminating testimony and (2) thereupon to acquit the defendant by disbelieving the very testimony they had already accepted as the truth. * * *"** [Emphasis added.]

What is really meant by the "accomplice rule," according to the Mangrella Court, at 408, is that one who testifies while he is faced with criminal charges may be influenced to testify falsely by the hope of leniency, and ordinarily the defendant upon request is entitled to have the jury so advised by an appropriate charge. It makes no difference that the witness was not an accomplice of defendant, or that defendant had no connection with the transaction that led to the charge against the witness. Id.

The judge may give such a charge without a request and, as a matter of fact, that was the origin of the "accomplice rule." Id., at 408-409, citing 7 *Wigmore, Evidence,* § 2057, *p.* 322 (*3d ed.* 1940). The judge need not give such a charge unless requested. Mangrella, at 409. It may be dangerous to volunteer such a charge for, as was pointed out in Begyn, supra, a defendant may claim to be prejudiced by it. Even when requested, the charge has to be carefully tailored to fit the facts of the particular case. Therefore, the defendant should be the one to ask for the charge and to do the tailoring.

Finally, the State of New York provides a case, which is directly on point with the facts before this Court. In People v Albury, 548 NYS2d 325; 156 AD2d 370 (1989), *app den* 75 NY2d 866 (1990), the Appellate Division, Second Department, affirmed defendant's convictions and sentences. The Albury Court, at 326, held:

> The defendant's contention that the trial court should have given an accomplice charge *sua sponte* is likewise without merit. In order for a

> witness to be deemed an accomplice as a matter of law, it must be established that based on the evidence presented, the jury could reach no other conclusion than that the witness participated in (1) an offense charged or (2) an offense based on the same or some of the facts which constitute an offense charged (see, *People v Tusa,* 137 AD2d 151). The evidence adduced at trial was in this respect lacking.

Similarly, the evidence adduced at defendant Gonzalez's trial was seriously lacking regarding whether Couch was an accomplice. If anything, the facts demonstrated that Woodrow Couch had not participated in the offenses charged against Gonzalez.

The facts demonstrate that Couch was not an accomplice.

Because the facts demonstrate that Woodrow Couch was not an accomplice of the defendant, the Court could not have committed reversible error by refraining from *sua sponte* giving an accomplice witness jury instruction. Amicus submits that the evidence, summarized in the following paragraphs, did not support such an instruction in this case.

The Saginaw Fire Department responded to the alarm from the victim's residence at about 10 or 15 minutes after 3 a.m. on February 14, 1998.[4] Firefighters discovered the victim's body in the back bedroom. Some portions of the body were severely burned. There were four points of origin to the fire. Blunt force head trauma caused the victim's death, with strangulation as a contributing cause of death. Both injuries occurred while she was alive. The body was face down, tied up on the bed. Police seized a ball bat found near the bedroom entrance. Wounds to the victim's head were consistent with being struck by an aluminum bat.

Woodrow Couch described himself and defendant as good friends. Woodrow saw defendant on February 13, 1998 at 5 p.m. when they went to the victim's apartment.

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[4] As stated in the Counter-Statement of Facts, Amicus adopts the facts articulated by Plaintiff-Appellee, the People of the State of Michigan.

They were at the apartment for about 30 minutes before returning to Woodrow's home. Woodrow and defendant played on the Play Station. Neither Woodrow's mother nor his sister was home. When Woodrow fell asleep, defendant was still there. Woodrow didn't remember his mom and sister returning home, and he didn't remember defendant leaving.

When Nancy Couch arrived home at about 2 a.m., her 17-year-old son, Woodrow, was asleep on the couch. Awakened by a thumping sound coming from downstairs between 2:30 a.m. and 3 a.m., Nancy Couch went downstairs where she found Woodrow still asleep. Looking lost, defendant was on the porch, knocking on the window. The next thing Woodrow remembered was waking up when his mother opened the door to defendant. It was unusual for defendant to appear at the Couches' home that late. Defendant asked if he could spend the night, and Nancy Couch allowed him to stay.

Woodrow awoke the next morning to find that defendant had already left the Couch home. Defendant left a message on the Couches' telephone answering machine. Defendant wanted Woodrow to look at the newspaper. Defendant sounded excited, like something cool was in the newspaper. Woodrow later talked to defendant, who said that he returned to the victim's home from the Couch house. Defendant admitted to Couch that he hit the victim in the head with a baseball bat. He then tied her up.

Samples of blood from the victim, defendant, and Woodrow Couch were sent to the lab for DNA analysis. The lab also did a PGM subtyping on the vaginal swab, and was unable to eliminate defendant as a possible source of the seminal fluid. Defendant's DNA was found in the victim's vaginal swab. DNA from the sperm sample in the rectal swab could have come from defendant. Woodrow Couch could be excluded from the

sperm DNA from the rectal swab. From the oral swab, the DNA could not exclude either the victim or defendant, but could exclude Woodrow Couch.

Brad Johnson knew defendant Gonzalez through school; they were friends. Johnson met the victim for the first and only time on February 13, 1998. Defendant told Johnson that the victim was dead. Defendant told Johnson that the victim was beaten to death with a crowbar and bat, and was burned. Defendant also said that someone raped the victim. Defendant said someone tied up the victim and beat her with a crowbar or bat. Then someone set the fire to make it look like she fell asleep with a cigarette in her hand. In addition to the ball bat, there was a crowbar; both were examined, without success, for blood or trace evidence. Defendant said he learned all this information from either the newspaper or a friend.

Assigned to cover the victim's death for the Saginaw News, Carrie Spencer wrote articles on February 15, 1998, February 16, 1998, and March 5, 1998. Spencer's articles stated that the victim had not died from natural causes, and that Saginaw County Prosecutor Mike Thomas could not elaborate. Spencer's articles also stated that investigators were not disclosing the cause of death, and her articles did not have any information as to the cause of death.

In one of his statements to police, defendant denied returning to the victim's home after leaving her apartment earlier on February 13. Defendant also denied having sex with the victim.

An accomplice is one who knowingly, voluntarily, and with common intent, unites with the principal in the commission of the crime, either by being present and joining in the criminal act as an aider and abettor, or, if absent, by advising and

encouraging in its commission. Chaney v Commonwealth, supra, at 772. Based on the evidence adduced at trial, it is obvious there was no proof connecting Woodrow Couch as an accomplice to the crimes committed by defendant.

Under the New Jersey test articulated in Mangrella, supra, Couch was not an accomplice because he could not be charged with and convicted of the offenses for which Gonzalez was on trial. Thus, the trial court properly refrained from *sua sponte* giving an accomplice witness jury instruction. Even if the defendant's trial counsel had requested an accomplice witness jury instruction, the trial court would have been justified, by the facts, in denying such a request.

An examination of Michigan's accomplice witness jury instruction rule

Michigan jurisprudence has a long history of cases involving accomplice testimony. A chronological discussion of Michigan case precedent follows.

People v Jenness, 5 Mich 305, 330 (1858) involved the prosecution of a man who engaged in sexual intercourse with his niece and was prosecuted for incest. The niece testified against the defendant, her uncle, and she was obviously an accomplice, in fact there could not have been a crime without her participation. The Jenness Court wrote:

> **"We think it is the duty of a judge to comment upon the nature of such testimony, as the circumstances of the case may require; to point out the various grounds of suspicion which may attach to it; to call their attention to the various temptations under which such witness may be placed, and the motives by which he may be actuated; and any other circumstances which go to discredit or confirm the witness, all of which must vary with the nature and circumstances of each particular case.** [Emphasis added.]

Later Michigan cases cite the Court's holding in Jenness. However, the Jenness Court cited no authority from anywhere in arriving at this legal holding!

People v Schweitzer, 23 Mich 301 (1871) involved a defendant charged with larceny. Counsel for defendant asked the court to instruct the jury: "That it is not safe to convict a defendant on the uncorroborated testimony of an accomplice, nor upon the uncorroborated testimony of any number of accomplices." The court refused and the jury convicted defendant.

The Schweitzer Court, at 305, held: "There was no error in the refusal of the court to charge that it is not safe to convict a defendant on the uncorroborated testimony of an accomplice, or any number of accomplices. This was exclusively a question for the jury, and we refer to *People v. Jenness* 5 Mich. 305, for the principle involved and the duty of the court charging the jury." The Schweitzer Court granted a new trial on other grounds (i.e., testimony that defendant committed another, distinct larceny from that for which he was on trial).

People v Wallin, 55 Mich 497, 504-505; 22 NW 15 (1885) involved two men charged with a robbery that occurred in an East Saginaw saloon. One of the men, Isdell, pled guilty, and Wallin went to trial. The defense asked the judge to instruct the jury that, because Isdell admitted his own guilt, and it appeared that he expected leniency at his sentencing in exchange for testimony against Wallin, the jury should give little, if any, credit to his testimony. The judge declined to give such an instruction, but told the jury that all questions of credibility of testimony were for them. The Wallin Court, at 505, held:

> "It is not the right of any party to demand such instructions as were here proposed. There is no such rule of law as the requests assume. The force of a witness' testimony depends upon the credit the jury think it entitled to; and no court has a right to lay down for a jury rules whereby they shall determine the force of evidence, irrespective of the credence they actually give it in their minds. *People v. Jenness* 5 Mich. 305; *People*

> *v. Schweitzer* 23 Mich. 301. The facts which manifestly detract from the credit are before the jury, and it is supposed they will duly weigh them; and specific directions that they must or must not believe a witness are an invasion of their province. The judge was right in declining them in this case, and he was right in saying to the jury, as he did in substance, that when the law permits persons to testify as witnesses, it assumed that they may tell the truth, and whether they have done so in the case is for the jury to say under all the circumstances appearing before them. . . . . We repeat that instructions respecting the credibility of witnesses, which involve no question of law, are not matter of right. The judge is under no obligation to comment upon the facts; he may, if he chooses, confine himself strictly to laying down such rules of law as must guide the action of the jury, and leave the facts to them without a word of comment. In many cases this is no doubt the desirable course. And it is always within the discretion of the judge to adopt it."

People v Murray, 72 Mich 10, 15-16; 40 NW 29 (1888) involved a young man convicted of raping his 11-year-old female cousin in Kalamazoo County. The Court held that it cannot reverse a judgment or set aside a verdict upon reviewing the facts when such facts have been properly submitted to a jury. Yet, ***under its general superintending power and control over all inferior courts and their proceedings*** [emphasis added], the Court could act if defendant did not receive a fair trial or manifest injustice occurred. The Murray Court wrote:

> "[I]t then becomes the imperative duty of the Court, with or without objections and exceptions by the respondent's counsel, to set aside such proceedings, and order a new trial."

The Murray Court further wrote:

> "Without any requests from counsel it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he should state to them fully the law applicable to the facts. Especially is this his duty in a criminal case. In this case it was not so done. Too much reliance is often placed upon counsel by the court in this respect for requests; but this should not be done. The court must do its duty in a criminal case, whether counsel do so or not. It is to the court that the accused has a right to look to see that he has a fair trial."

for the People. On appeal, defendant claimed the trial court did not, as fully as the circumstances of the case demanded, comment upon the testimony of Rankowsky. It did not appear that any request to instruct on this point was made.

No reference was made in the jury instructions to the position of Rankowsky as an accomplice in the commission of the crime. Identity of the men who committed the assault did not depend solely upon the testimony of Rankowsky. The Dumas Court, at 48, wrote:

> "It is the long settled rule in this State that the credibility of an accomplice, like that of any other witness, is a question exclusively for the jury. And while there have been intimations, rather than rulings, to the effect that it is proper, or is not improper, especially in cases where an accomplice is the sole witness upon a material point, for the trial court to direct the attention of the jury to the circumstance and invite the exercise of caution upon the part of the jury, ***we know of no decision of this court in which it is held or intimated that the failure of the court to indulge in voluntary comment is ground for reversal.***" [Emphasis added.]

The Dumas Court found no error, and affirmed defendant's conviction.

People v Zesk, 309 Mich 129; 14 NW2d 808 (1944) involved a defendant convicted of first-degree murder. While defendant kept watch outside, Kozakiewiecz entered an Owosso gas station to rob the attendant, George Shaw, whom Kozakiewiecz fatally shot. Kozakiewiecz and defendant divided the proceeds of the robbery, approximately $30.00.

The sole witness against defendant was Kozakiewiecz, who pled guilty to the crimes, and described details of the robbery and murder, including defendant's active participation. Defendant presented alibi witnesses who testified that he was in Detroit at the time of the robbery. Defendant claimed the trial judge should have instructed the jury to look with suspicion on the testimony of a self-confessed murderer and perjurer (there

were inconsistencies in Kozakiewiecz's previous statements). Citing 1 Gillespie on Michigan Criminal Law & Procedure, § 379, the Zesk Court, at 132, held:

> "The credibility of an accomplice, like that of any other witness, is exclusively a question for the jury, and it is well settled that a jury may convict on such testimony alone, and it is not error for the court to refuse to charge that it is not safe to convict a defendant, on the uncorroborated testimony of an accomplice."

The Zesk Court, at 133, also found, "The trial judge probably would have charged the jury to carefully consider the weight of the accomplice's testimony had defendant's counsel made the request. There was no error."

People v DeLano, 318 Mich 557; 28 NW2d 909 (1947) involved a criminal conspiracy to corrupt the Legislature of the State of Michigan. The DeLano Court, at 567, observed that the only testimony given as to the participation of DeLano in the conspiracy was that of the People's witness Williams. The DeLano Court, at 567-568, then cited People v Zesk, supra, where the Court found that the correct rule is well stated in 1 Gillespie on Michigan Criminal Law & Procedure, § 379. The DeLano Court, at 568, found that the credibility of the witness Williams was exclusively a question for the jury, and there was evidence that DeLano and Sherman joined in the conspiracy to corrupt the legislature.

In People v McCoy, 392 Mich 231, 236-237; 220 NW2d 456 (1974), defendant appealed the affirmance of his conviction by a jury of first-degree murder. Defendant was sentenced to life imprisonment. Basing its holding regarding accomplice testimony on People v Jenness, supra,[5] the McCoy Court reversed the judgments of the appellate

[5] Again, it is instructive to note that the Michigan Supreme Court's holding in Jenness, regarding a trial court's *sua sponte* duty to instruct a jury on the unreliability of accomplice testimony, is not based on any legal authority or precedent cited in that case.

court and the trial court affirming the defendant's conviction and remanded the case to the trial court for a new trial. In McCoy, the victim storeowner was killed during a robbery. The other store proprietor positively identified the accomplice, Vincent Carter, but could not identify defendant in a lineup. Carter remained in custody, and he told police that defendant was the murderer. Carter testified at defendant's trial. The defense was alibi, and defendant denied knowing Carter or owning a gun.

The McCoy majority found reversible error in the judge's alibi instruction and in his failure to balance his denigrating of the alibi defense with appropriate instructions on the credibility of an alleged accomplice, the prosecutor's only witness putting defendant at the scene of the crime.

In McCoy, the only evidence the prosecutor offered linking defendant with the crime was an eyewitness who could not make a positive identification of defendant and testimony of an accomplice who was positively identified and who later pled guilty to the lesser charge of second-degree murder.

While defendant and his witness testified they had been watching television at the witness's house all day, the prosecutor's witness, the accomplice, placed defendant at the crime scene. The prosecutor's case rested on the uncorroborated testimony of this accomplice and his credibility as a witness. The issue came down to whom to believe, defendant and his witness or the accomplice.

The majority cited Am Jur 2d, Evidence regarding the dangers inherent in receiving the testimony of an accomplice. The Supreme Court recognized that defendant has a right to have a special cautionary instruction given to the jury concerning such testimony. The majority cited federal cases that stand for the proposition that failure to

give a limiting instruction has been found to be reversible error. DeCarlo v United States, 422 F2d 237 (CA 9, 1970) limits the finding of no error to a situation where no request was made for an instruction.

Justice Mary Coleman, joined by Justice John Fitzgerald, dissented. They observed that the Court of Appeals did not review the substance of defendant's allegations of errors. The failure to request instructions and the failure to object to the instructions as given precluded appellate review. No manifest injustice resulted which could override the lack of objection.

In McCoy, defendant argued that the trial court had a duty, even without request, to instruct the jury to regard an accomplice's testimony with grave suspicion and to examine it carefully. The dissent examined the statute, MCL 768.29, and court rule, GCR 1963, 516.1 and .2 [precursor of MCR 2.516(A) and (C)]. Justice Coleman wrote, the instruction which defendant says the court should have given without request does not go to defendant's theory of the case. It is not required by either statute or case law. There is no indication that failure so to instruct the jury denied defendant a fair trial. There is no basis for concluding that injustice has resulted. In fact, the accomplice was thoroughly cross-examined and the jury fully aware of all facets of his involvement. The judge correctly instructed that the testimony of all witnesses should be considered as to motive, prejudice, bias or interest in the outcome.

People v Atkins, 397 Mich 163; 243 NW2d 292 (1976) involved a defendant who appealed from the Court of Appeals, which had affirmed his conviction by a jury for the sale of heroin. Defendant challenged his conviction based on the trial court's failure to, *sua sponte,* instruct the jury concerning the credibility of the addict-informer who

testified for the prosecution. That testimony was the only evidence directly linking defendant to the crime. The court affirmed the conviction, noting that the defense had not requested a special instruction and had not objected to the instructions as given. The court held that MCL 768.29, and the court rule conditioned the requirement of an instruction on a request. The Supreme Court affirmed defendant's conviction. The Atkins Court, at 171-172, analyzed McCoy, writing:

> In *People v McCoy,* 392 Mich 231, 236-238; 220 NW2d 456 (1974), this Court dealt with a related area of jury instructions regarding the credibility of accomplices. A majority of this Court therein held prospectively that it would be reversible error "to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge". n6 This holding does not require reversal in the instant case, nor are we of the opinion that in the interests of justice it should be so extended. First, ***the McCoy rule under discussion was given prospective application for the reason that it went beyond long-established Michigan precedent to the effect that special instructions regarding credibility was a matter within the sound discretion of the trial court.*** Second, there was no imbalance in the instructions given in the instant case. In *McCoy,* error was found in the trial court's failure to balance care and caution language actually used in the instruction on alibi with similar language relating to the accomplice who testified against the defendant. Third, the jury in the case at bar was fully apprised of the criminal past, and possible motivation of witness Nero. It would not be an unfair assessment of the record herein to say that as much testimony was elicited on the issue of Nero's credibility as on that of defendant's guilt or innocence. Defense strategy from the outset was to put witness Nero on trial. In the face of this clear strategy, we cannot assume that defense counsel lightly disregarded the possibility of requesting a cautionary instruction or that such an instruction would have been refused if requested. Under the circumstances, MCLA 768.29; MSA 28.1052, and GCR 1963, 516.1 and 516.2 are controlling. [Emphasis added.]

Footnote 6 reads, that to implement the McCoy Court's holding, the proposed Michigan Criminal Standard Jury Instructions then circulating for study and comment contained a cautionary instruction relating to accomplice testimony. The Atkins Court, at

172, held that the credibility of an addict-informer, like that of an accomplice, is a jury question, and that the jury may convict on such testimony alone.

People v Till, 80 Mich App 16; 263 NW2d 586 (1977) involved a defendant who appealed from a judgment of the Recorder's Court of Detroit on a verdict convicting him of first-degree murder for killing a victim during the course of robbing him after forcibly gaining entry into the victim's house. Prior to instructing the jury, a co-defendant requested that a special instruction be given concerning the credibility of accomplice testimony, since the prosecution's only substantial evidence connecting the defendant with the crime was the testimony of an accomplice. Defendant requested no instruction, nor did he object to its omission or raise it as error in his motion for new trial.

The Till Court, at 21, found it unnecessary to decide whether a co-defendant's request for an instruction is operative as to all defendants. Rather, it was the Till Court's conclusion that even if requested, under the circumstances in that case the trial judge properly denied the request.

The Till Court, at 22-23, found there was no instructional imbalance in that case. The defendants offered no alibi defense. As in Atkins, the jury was fully apprised of the accomplice's criminal background. In the jury instructions, the trial judge gave a general instruction on factors to be considered in evaluating the witnesses' credibility. During the accomplice's testimony, the trial judge interjected a special instruction to the jury that the accomplice's involvement in other crimes and the consideration given for his testimony were to be considered by the jury in assessing credibility. The Till Court wrote, at 23, that,

> Under the circumstances, it is our conclusion that it was within the trial judge's discretion to deny a request for a further instruction aimed at the

> accomplice's credibility. A contrary conclusion would be tantamount to ruling that, in the face of a request for a special instruction, the trial court has no discretion to deny the request, notwithstanding the trial circumstances. Such a rule would create a substantial risk of an imbalance diametric to that in *McCoy,* destroying the balanced trial presentation that was the objective of that decision.

People v Till, 411 Mich 982 (1981) involved the reversal, in part, of the Court of Appeals judgment. The Supreme Court reinstated defendant's conviction of first-degree murder. The Supreme Court wrote, "On this record it is unclear that defendant objected to a lack of lesser included offense instruction. The trial court was not under obligation to give *sua sponte*, lesser included offense instructions. *People v Jenkins,* 395 Mich 440, 443 (1975)."

People v Worden, 91 Mich App 666; 284 NW2d 159 (1979) involved a defendant charged with forgery. Defendant was convicted by a jury of the charged offense and sentenced to 8-1/2 to 14 years in prison. Defendant claimed that the trial court committed reversible error by failing to give *sua sponte* a cautionary instruction regarding an accomplice's testimony. The Worden Court cited People v McCoy, supra, at 240, wherein the Supreme Court stated: "[If] the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge."

In Worden, there was no request to charge and for error to occur the Court held it must find that the issue was closely drawn. Citing People v Gordon Hall, 77 Mich App 528; 258 NW2d 547 (1977), the Worden Court, at 684, wrote that when a single accomplice testifies that a defendant did the act charged, and the defendant denies any participation in the crime, then the issue is closely drawn because the trial becomes a credibility battle between the testifying accomplice and the defendant. In Worden,

however, it was not the defendant's word against a single testifying accomplice, but rather his word against the testimony of two accomplices and two nonaccomplices. After reviewing the record, the Worden Court found that the issue was not so closely drawn as to require the trial court to give *sua sponte* a cautionary instruction regarding accomplice testimony. Additionally, the Worden Court, at 684-685, noted that the jury instruction given by the court regarding the credibility of witnesses and the weight to be given to their testimony was fair and balanced and adequately protected defendant's interest.

People v VanDorsten, 96 Mich App 356; 292 NW2d 134 (1979) involved a defendant convicted by a jury for delivery of heroin. The trial court did not *sua sponte* give a cautionary instruction regarding the accomplice testimony of a man named Ripple, but did give a general cautionary instruction concerning the credibility of witnesses. The VanDorsten Court, at 362, cited People v McCoy for the proposition that it was reversible error for a court not to give *sua sponte* a cautionary instruction regarding an accomplice's testimony where the issue was tightly drawn. But, the VanDorsten Court went on that People v Gordon Hall, supra, indicates that the issue is tightly drawn where the sole evidence linking a defendant to an offense is the testimony of the accomplice and defendant makes a total denial of this accomplice's testimony. In VanDorsten, there was other evidence linking defendant to the crime, convincing the Court that the issue was not so tightly drawn as to require a *sua sponte* cautionary instruction. Id.

People v Wilson, 119 Mich App 606; 326 NW2d 576 (1982) involved a defendant convicted of armed robbery, and felony firearm. Defendant's alleged accomplice, Kenneth Ray Hill, claimed that he had driven defendant to the market and that defendant

had robbed the market. Defendant testified that he was with his girlfriend at the time of the robbery and his girlfriend corroborated his alibi.

The Wilson Court, at 617-618, held that the trial court did not commit error by *sua sponte* giving a cautionary instruction on the credibility of accomplice testimony. The general rule regarding jury instructions is that failure of the court to instruct on any point of law is not grounds for reversal unless such instruction was requested by the accused. Id., at 618, citing MCL 768.29. The Supreme Court created an exception to this general rule in People v McCoy, supra, at 240.

The Wilson Court, at 618-619, discussed the Supreme Court's analysis of McCoy in People v Atkins, supra, at 171-172. The Wilson Court, at 619-620, wrote:

> The result of these two cases, when read together, is that some panels of this Court focus on the imbalance issue with regard to the instructions while other panels deal with the "closely drawn" language of *McCoy*. In *People v Till,* 80 Mich App 16, 20-22; 263 NW2d 586 (1977), *modified on other grounds* 411 Mich 982 (1982), this Court upheld a trial court's refusal to give an accomplice instruction pursuant to request of defense counsel. The Court found no imbalance in jury instructions and concluded that the *McCoy* decision was not intended to preclude all discretion of the trial judge in assessing the necessity of giving a special instruction on accomplice credibility.
>
> In *People v Hanna, supra,* the Court upheld a trial judge's failure to *sua sponte* give a cautionary instruction on accomplice testimony. The Court found no imbalance in instructions given to the jury.
>
> Those panels of this Court which have examined the *McCoy* issue by focusing on the "closely drawn" language have initially begun by attempting to define that phrase. Generally, a case is considered to be closely drawn when the trial becomes a credibility battle between the accomplice and the defendant.

In Wilson, defense counsel did not request a specific cautionary instruction on accomplice testimony, and the trial judge did not give one *sua sponte.* However, a general instruction on credibility of witnesses was given twice. Id., at 621.

The Wilson Court, at 622, noted that, in McCoy, several factors were taken into account which were not present in Wilson. First, the McCoy trial judge denigrated the alibi defense by instructing that "an alibi is a defense that is easily proven and hard to disprove." Further, the testimony of the McCoy accomplice was uncorroborated and his credibility as a witness was crucial. Such was not the case in Wilson.

Wilson was not a "closely drawn" case. The prosecution introduced other witnesses to corroborate the accomplice's testimony. Hill's credibility was placed in issue and was severely challenged by defense counsel. The jury knew the details of Hill's plea agreement, and they knew his background. Given these facts, it was not unduly prejudicial and, therefore, not reversible error for the trial judge to fail to give *sua sponte* a cautionary instruction on accomplice testimony. Id., at 622-623.

The Wilson Court observed that McCoy did not use mandatory language in its requirement to give the accomplice testimony instruction *sua sponte.* The decision left that matter at the discretion of the trial court. Further, the rule of McCoy is an exception to MCL 768.29 and GCR 1963, 516.1 and 516.2,[6] which require defense counsel to propose jury instructions and to object to a trial court's failure to give those instructions for reversible error to be found. As an exception, the rule of McCoy should be narrowly applied and the circumstances under which it is applied should be closely scrutinized. Id.

The pitfalls of complying with an oral request

The pitfalls of complying with an oral request is illustrated in People v Clark, 453 Mich 572; 556 NW2d 820 (1996), which involved a defendant convicted of involuntary manslaughter for withholding liquid from her four-year-old, adopted son because of his

[6] GCR 1963, 516.1 and 516.2 are now MCR 2.516(A), (B), and (C).

bedwetting problem. The boy died from severe dehydration. The Supreme Court held that when the trial court agreed to give an instruction and then changed its mind after argument, prejudice resulted, and a new trial was required. The Supreme Court affirmed the appellate court's judgment, which reversed the defendant's conviction.

After the prosecutor's closing argument, defense counsel requested a change in the jury instruction on gross negligence. Defense counsel wanted the phrase "cause death" to replace cause "serious injury," in CJI2d 16.18(4). This request occurred in a sidebar conference, out of the hearing of the jury, and was not recorded. However, without considering the effect this would have on the proceedings, the prosecutor and the judge agreed to the modification. Defense counsel then proceeded with her closing argument. The defense argued that the decedent was a difficult child, that the defendant was not inattentive to his needs, but was a concerned parent doing her best in a difficult situation, and that it could not possibly have been apparent to her that her actions would result in his death.

Before instructing the jury, defense counsel raised the issue of the changed instruction to confirm the modification. The prosecutor entered an objection to the previously modified instruction, noting that the people did not have to prove that the defendant knew that her actions would cause death under the definition of gross negligence embodied in the manslaughter instructions. Indicating that the modification might be a misstatement of the law and that it also set a higher standard than the law required, the judge changed his mind and decided that the instruction should not be given. Consequently, the judge properly instructed the jury with the standard instruction that was the correct statement of the law.

Defense counsel objected because she had relied on the modified instruction in formulating her closing argument. The judge, acknowledging the predicament that had been created, offered the defense the opportunity to reopen her closing argument. Defense counsel declined this invitation, stating that in her opinion the modified instruction was not a misstatement of the law and that to reargue would only accentuate issues that should not be accentuated and create credibility problems with the jury. Further, she noted that she could not prepare a new argument on such short notice.

The defendant appealed her conviction in the Court of Appeals, arguing that the modification of the jury instruction and defense counsel's reliance on the modification, and the judge's decision to give the unmodified instruction, was sufficiently prejudicial to require reversal.

A court must properly instruct the jury so that it may correctly and intelligently decide the case. People v Townes, 391 Mich 578, 586; 218 NW2d 136 (1974), citing People v Murray, supra. The pertinent rule in criminal trials is MCR 6.414(F), which provides:

> Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but with the parties' consent, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

MCR 2.516(A)(1) is the rule governing civil trials and similarly provides:

> At a time the court reasonably directs, the parties must file written requests that the court instruct the jury on the law as stated in the requests. In the absence of a direction from the court, a party may file a written request for jury instructions at or before the close of the evidence.

This rule provides further that "the court shall inform the attorneys of its proposed action on the requests before their arguments to the jury. MCR 2.516(A)(4).

The reason for this is obvious. Clarity in instructions and understanding by counsel of the exact nature of the charge is critical, because counsel shape their arguments to conform to the law as defined by the instructions. Clark, supra, at 584.

In Clark, prejudice requiring reversal was incurred when the judge, after agreeing to a modified instruction, subsequently decided to charge the jury with the unmodified instruction after defense counsel relied on and conformed her closing arguments to the modified instruction. Defense counsel tailored her closing argument to be consistent with the theory that the defendant could not possibly have known that withholding water from the child would lead to his death. This is a far greater threshold of knowledge for the prosecutor to prove than proving merely that the defendant knew her actions would cause serious injury, which was the theory argued by the prosecutor.

Joined by Justices Boyle and Weaver in his dissenting opinion, Justice Brickley wrote that the intent of MCR 6.414 is apparent: both parties should have sufficient notice of how the court will instruct the jury so that they can frame their arguments appropriately. By requiring that requests be submitted in writing, both parties and the trial court will have time to reflect on the proposed instructions. Had defense counsel complied with MCR 6.414(F), it is doubtful that this case would have gone before the Supreme Court. Clark, supra, at 608.

The prosecutor first learned of defense counsel's proposed departure from the standard jury instructions after her closing argument. Because the request was brought after the prosecutor had made her closing argument, she was unable to frame her

argument to this new standard. It is the trial court's duty to correctly instruct the jury on the law. MCL 768.29; People v Townes, supra. Under appropriate circumstances, a trial court must comply with an oral request; however, the facts found in Clark demonstrate the pitfalls of doing so. Id., n24.

***McCoy* should be overruled**

Clarity in instructions and understanding by counsel of the exact nature of the charge is critical, because counsel shape their arguments to conform to the law as defined by the instructions. That is why written requests for jury instructions are mandated under MCR 6.414(F). Although trial courts may grant oral requests for jury instructions, there are pitfalls in complying with such requests as illustrated by the Clark case, supra.

Where, as here, a defendant denies committing the crime, an accomplice jury instruction is risky because there is an inference that defendant committed the crime if the witness testifying is his accomplice. Defense counsel may make a strategic decision to avoid such an inference by not requesting the accomplice witness instruction. If the trial court *sua sponte* gives the accomplice witness instruction, it undercuts defense counsel's strategic choice to forego such an instruction along with its attendant inference of guilt.

Nor was the issue "tightly drawn" in this case. An issue is tightly drawn where the sole evidence linking a defendant to an offense is the testimony of the accomplice and defendant makes a total denial of the accomplice's testimony. This case was not merely a credibility battle between the alleged accomplice, Woodrow Couch, and the defendant. Scientific evidence (DNA), defendant's own admissions, and the testimony of several other witnesses, corroborated Couch's testimony. Michigan cases hold that, where the

issue is not closely or tightly drawn, it is not reversible error to fail to give an accomplice witness instruction.

In McCoy, supra, at 240, the Supreme Court created an exception to the general rule that failure of the court to instruct on any point of law is not grounds for reversal unless such instruction was requested by the accused. Wilson, supra, at 618, citing MCL 768.29. Further, the McCoy Court based its holding on Jenness, which was not based on any cited authority.

Finally, it is instructive to recall the first part of the Mangrella "accomplice witness" rule: one who testifies while he is faced with criminal charges may be influenced to testify falsely by the hope of leniency. Woodrow Couch was never charged in connection with the victim's murder. Simply put, there was no evidence establishing probable cause for charging Couch, much less proving the guilt beyond reasonable doubt necessary for convicting him. Based on these considerations, this Honorable Court should affirm, and, in doing so, overrule the holding in People v McCoy, supra, because it lacks supporting authority, and could undercut defense strategy, thus impairing a defendant's Sixth Amendment right to the effective assistance of counsel.

III

Defendant claims that he was denied the effective assistance of counsel when his trial attorney failed to request a jury instruction on the unreliability of accomplice testimony. Where, as here, the trial court properly instructed the jury, defendant's attorney is not required to advocate a position that lacks merit.

Issue Preservation and Standard of Review: A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing. People v Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973). Here, Gonzalez took no steps to develop a testimonial record in support of his claim that his trial counsel was ineffective and has therefore largely forfeited it. People v Dixon, 217 Mich App 400, 408; 552 NW2d 663 (1996). Thus, review is limited to the existing record. People v Armendarez, 188 Mich App 61, 74; 468 NW2d 893 (1991).

The standard for determining whether a defendant was denied the effective assistance of counsel was explained by the Michigan Supreme Court in People v Pickens, 446 Mich 298; 521 NW2d 797 (1994). To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant. Id., at 312. Defendant did not make a motion for a new trial or have a Ginther hearing.[7]

Legal Analysis: A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the

[7] Reflected in docket entries -- Appendix pages 5a-6a; also the Court of Appeals Opinion noted there was no Ginther hearing.

trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999) citing People v Ginther, supra, at 442-443.

Gonzalez argues that he was denied the effective assistance of counsel because his trial attorney did not request an instruction on the unreliability of accomplice testimony. Yet, defendant's trial attorney may have refrained from requesting such an instruction for strategic reasons. It's risky to request an accomplice witness jury instruction because if the witness is guilty of a crime, and he is the accomplice of the defendant, then the defendant is also guilty of the crime. We do not know if that was trial counsel's thinking because no Ginther hearing was conducted in this case.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. People v Wilson, 180 Mich App 12, 17; 446 NW2d 571 (1989); People v Hunter, 141 Mich App 225, 229; 367 NW2d 70 (1985). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991). Moreover, an appellate court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. People v Kvam, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant Gonzalez cannot overcome the presumption of sound trial strategy and show that the deficiency, if any existed, was prejudicial to him. Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); People v Pickens, supra.

By foregoing a request for an accomplice witness jury instruction, defendant's trial attorney provided effective assistance. His strategy was entirely reasonable, on the basis of the facts of this case. People v Lloyd, 459 Mich 433, 450; 590 NW2d 738 (1999). Strickland and Pickens teach that a defendant has been deprived of the effective assistance of counsel if "counsel's performance was deficient" and "the deficient performance prejudiced the defense." Strickland, supra, at 687. In this case, neither conclusion is supported by the record. Counsel's performance was entirely adequate, and in no respect prejudicial to the defendant. Lloyd, supra, at 450.

Even if we assume that the defendant's legal position is correct, defendant failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." People v Hoag, supra, at 7. Once again, the burden is on the defendant to establish the evidentiary support "which excludes hypotheses consistent with the view that his trial lawyer represented him adequately." Hoag, supra, at 8, citing Ginther, supra, at 443. In this case, there is no evidence on the record about how defendant's theory of the case might have changed or how that change might have been successful. Hoag, supra.

The prosecution presented an extremely strong case of circumstantial evidence against defendant Gonzalez. "This is not only permissible, but some jurists and legal commentators regard such evidence as more trustworthy than direct testimony." People v Davis, 57 Mich App 505, 508; 226 NW2d 540 (1975). Circumstantial evidence, if well authenticated, can be more positive than direct evidence. Id., 508-509, citing People v Iron, 26 Mich App 235, 240; 182 NW2d 342 (1970).

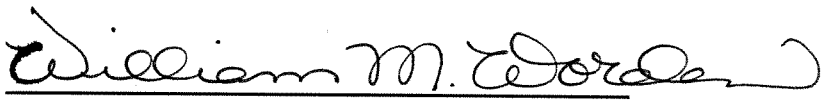
To demonstrate ineffective assistance of counsel, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the defendant. Strickland v Washington, supra; People v Pickens, supra. Defense counsel's actions involved trial strategy, and they did not result in defendant Gonzalez's conviction. The overwhelming weight of inculpatory evidence resulted in Gonzalez's conviction.

Relief Requested

The People respectfully ask this Honorable Court to **AFFIRM** defendant Gonzalez's first-degree murder conviction and sentence of life without the possibility of parole.

JEFFREY L. SAUTER
EATON COUNTY PROSECUTOR

Dated: April 5, 2003



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